No. 79-1502

IN THE

Supreme Court of the United States

October Term 1980

KERN COUNTY WATER AGENCY, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, SANTA CLARA VALLEY WATER DISTRICT, AND TULARE LAKE BASIN WATER STORAGE DISTRICT,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Reply Brief of Petitioners.

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Reply Brief of Petitioners.

Introduction.

The petitioners, four public water agencies that rely on the water supply diversion that is the subject of this action, hereby reply to the briefs for respondents and *amici curiae* National Wildlife Federation and Operation Wildlife. Those briefs attempt to justify major changes in the manner in which Section 10 of the Rivers and Harbors Act of 1899 (the "1899 Act")[1] has been administered for three-quarters

[1]The term 1899 Act, as used in this brief, also refers to its predecessor act, adopted in 1890, which is discussed with respect to private rights of action.

of a century. The proposed changes would add a private right of enforcement, as well as a major expansion of administrative controls.

Respondents and *amici* seek to exploit that statute by transforming its historical role of federal protection for waterborne commerce, to one of general control over state regulated water supply operations.

I.

FAILURE TO ESTABLISH A PRIVATE RIGHT OF ENFORCEMENT.

A. The Sierra Club's Argument With Respect to Private Rights of Action Is Historically Unsound and Improperly Distinguishes the Recent Precedents.

The Sierra Club[2] brief accepts the position of petitioners and federal respondents with respect to the proper method for determining if a federal statute creates a private right of action. Hence, none of the parties are supporting the lower court's reasoning on that issue. Instead, the arguments properly revolve around this Court's recent opinions in *National Railroad Passengers Corp. v. National Association of Railroad Passengers* (the "*Amtrak* case"), 414 U.S. 453, 94 S.Ct. 690 (1974); *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479 (1979); and *Transamerica Mortgage Advisors Inc. (TAMA) v. Lewis*, 444 U.S. 11, 100 S.Ct. 242 (1979), which have established the criteria to be used to determine whether Congress intended to create a private right of enforcement.

Predictably, because the guidelines established by the recent cases augur strongly against a private right of action,

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[2]Our references to Sierra Club include the other plaintiffs and *amici* National Wildlife Federation and Operation Wildlife.

the Sierra Club devotes a majority of its brief to the historical backdrop of the 1899 Act's adoption, in an attempt to demonstrate that the usual rules of statutory construction should not apply. In conducting its historical analysis, however, the Sierra Club has committed a fundamental error which renders its effort logically flawed. It has misread the pre-1890 federal cases as having created private rights to enjoin navigational interferences under federal law. This is an incorrect reading of the cases and seriously affects the remainder of the Sierra Club's historical argument.

1. The Pre-1890 Federal Cases Do Not Support the Sierra Club's Historical Interpretation of the 1899 Act.

The Sierra Club's efforts to create a private right of action begin with a discussion of about a dozen pre-1890 federal and state cases which established the common law doctrine that a private party could obtain an injunction against a navigational obstruction if particularized injury (*i.e.*, a private nuisance) could be demonstrated. (Sierra Br. 18-29). Sierra Club then sets forth the premise of its argument, as it involves these pre-1890 cases, as follows:

> As seen above, the pre-1890 decisions of this Court had clearly established (1) that a private action would lie to enjoin an unlawful obstruction to navigation, but (2) that an obstruction authorized by state law would not be deemed unlawful in the absence of a specific congressional prohibition, and further (3) that specific congressional action would also be necessary to authorize any challenge to such an obstruction by the Attorney General on behalf of the United States. The statute which Congress enacted against this background expressly addresses the latter two issues but says nothing about the first, and *the question has accordingly been presented whether Congress's silence on that score implies an intent to leave the existing remedial*

> *scheme in place or to change the law in that regard by abrogating the established remedial rule.* [Sierra Br. 30-31; emphasis added.]

The only logical inference that flows from this quotation is that the Sierra Club believes that the pre-1890 cases established a federal question cause of action for nuisance always maintainable in the federal courts and that petitioners are contending that enactment of the 1899 Act eliminated this preexisting federal right of action. This characterization of petitioners' position is repeated at page 36 of the Sierra Club brief where it is argued that the Congressional debates:

> provide a clear refutation of the notion, on which both the federal respondents and the intervening water agencies have principally based their argument on this whole issue, that the statutory enforcement of the Act by the Attorney General was intended as an implicit abrogation of the remedial rights of private parties.

The twice used term "abrogate" is defined by Webster's as "to abolish" or "do away with." In other words, it connotes the prior existence of a thing or right. But, the Sierra Club is simply wrong in contending that the pre-1890 cases had created a private party right to bring suit under federal law for injunctive relief against obstructions to navigation. The issue is not whether Congress intended to abrogate an existing right in 1890, but whether it intended to create a new right by the legislation.

The Sierra Club cites ten United States Supreme Court cases for its contention that a right to sue in the federal court for navigational interference existed in 1890. But in each of those cases, the Court was either (a) applying local law in a diversity situation, (b) accepting jurisdiction because a State was a party, or (c) rejecting a contention that a federal statute provided a basis for relief. The accuracy of this statement is demonstrated by even the most cursory

reading of *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8 S.Ct. 811 (1888).

That case catalogues and describes each of the cases cited by the Sierra Club and summarizes the state of the law in 1888 as follows:

> The power of congress to pass laws for the regulation of the navigation of public rivers, and to prevent any and all obstructions therein, is not questioned. But until it does pass some such law, there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers, unless it be the maritime law, administered by the courts of admiralty and maritime jurisdiction. No precedent, however, exists for the enforcement of any such law; and if such law could be enforced, (a point which we do not undertake to decide,) it would not avail to sustain the bill in equity filed in the original case. There must be a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the states. Such obstructions and nuisances are offenses against the laws of the states within which the navigable waters lie, and may be indicted or prohibited as such; but they are not offenses against United States laws which do not exist; and none such exist except what are to be found on the statute book. Of course, where the litigant parties are citizens of different states, the circuit courts of the United States may take jurisdiction on that ground, but on no other. This is the result of so many cases, and expressions of opinion by this court, that it is almost superfluous to cite authorities on the subject. We refer to the following by way of illustration: *Willson v. Creek Co.*, 2 Pet. 245; *Pollard's Lessee v. Hagan*, 3 How. 229; *Passaic Bridge Cases*, 3 Wall. 782; *Gilman v. Philadelphia*, *Id.* 724; *Pound v. Turck*, 95 U.S. 459; *Escanaba Co. v. Chicago*, 107

> U.S. 678, 2 Sup.Ct. Rep. 185; *Cardwell v. Bridge Co.*, 113 U.S. 205, 5 Sup.Ct. Rep. 423; *Hamilton v. Railroad*, 119 U.S. 280, 7 Sup.Ct. Rep. 206; *Huse v. Glover*, 119 U.S. 543, 7 Sup.Ct. Rep. 313; *Sands v. Improvement Co.*, 123 U.S. 288, 8 Sup.Ct. Rep. 113; *Transportation Co. v. Parkersburg*, 107 U.S. 691, 700, 2 Sup.Ct. Rep. 732. The usual case, of course, is that in which the acts complained of are clearly supported by a state statute; but that really makes no difference. Whether they are conformable, or not conformable, to the state law relied on, is a state question, not a federal one. The failure of state functionaries to prosecute for breaches of the state law does not confer power upon United States functionaries to prosecute under a United States law, when there is no such law in existence. [125 U.S., at 8-9, 8 S.Ct., at 815].

What is clear from the *Willamette* case is that the Sierra Club, in 1890, could not have brought this non-diversity case against the State of California in the federal courts. When properly viewed in this light, the question becomes, as it was articulated in petitioners' opening brief, whether Congress intended to create a *new* private right of action in the federal courts. The issue is not, as the Sierra Club attempts to frame it, whether Congress intended to eliminate an existing federal remedy.

2. The Recent Supreme Court Cases Are Applicable and Relevant to the 1899 Act.

Petitioners will not reiterate the statutory interpretation discussion contained in their opening brief. However, several responses to the Sierra Club's brief are required. The bulk of that brief is devoted to the legislative history of the 1899 Act, and this aspect will be addressed below. However, the legislative history review must be put into perspective. It is not the primary tool for statutory interpreta-

tion. The language of the statute itself must be examined first. *Touche Ross Co. v. Redington*, 442 U.S. 667, 689, 99 S.Ct. 2479, 2485 (1979).

Petitioners' opening brief noted that the *Amtrak* and *TAMA* cases, *supra*, hold that when a statute expressly provides a particular remedy, the courts must be chary of reading others into it. (*TAMA v. Lewis*, 444 U.S. at 19-20, 100 S.Ct. at 247). The Sierra Club attempts to distinguish the *Amtrak* case by arguing that it involved different statutory terminology (Sierra Br. 10, fn.). While it is true that each of the relevant cases involves varying statutory wording, the principle of the *Amtrak* case has been applied to a wide variety of statutes and can and should be applied in this case. Application of the *Amtrak* principle must lead to an initial determination that Congress intended exclusive enforcement of the 1899 Act to rest with the Department of Justice. (See Ptrs. Br. 12-13).

The Sierra Club urges the Court to use *Allen v. Board of Elections*, 393 U.S. 544, 89 S.Ct. 817 (1969), as substitute for the *Amtrak* analysis. This would be improper as *Allen* was not a case primarily decided by reference to enforcement language. As noted in *Cannon v. University of Chicago*, a private right of action was found to exist in the *Allen* case because the substantive sections of the 1965 Voting Rights Act described a special class to be benefited (441 U.S. at ...., 99 S.Ct. at 1954). This is in stark contrast to the 1899 Act which generally proscribes conduct with no reference to a benefited class.

Surprisingly, after citing the *Allen* decision, which turned on the language of the substantive clauses of the Voting Rights Act in spite of the fact there were specific remedial sections in that statute, the Sierra Club next attacks our reliance on the *Cannon* case because, in its view, where a statute contains a specific remedial scheme, its substantive

provisions are not the proper focus of analysis (Sierra Br. 15). In addition to being proven incorrect by the *Allen* case, this proposition won't stand logical scrutiny. Even where a remedial scheme exists, the substantive language can be a valuable checkback to see if the inferences derived from a review of the remedial provisions are supported or weakened. Such is the case with the 1899 Act. Its substantive provisions, which are general prohibitions of conduct, with no focus on any individual or group, support the conclusion reached from the language of the remedial sections that private enforcement of the Act was not intended. So *Cannon* is very relevant to the issues under consideration.

3. The Legislative History of the 1899 Act Does Not Support a Finding That a Private Right of Action Was Intended.

Once it is determined that the statutory interpretation standards discussed in our opening brief are relevant, one can return to the legislative history. But this return is with a different perspective from that contained in the Sierra Club's brief. First, one must find "persuasive evidence of a contrary legislative intent" before the interpretation flowing from the statutory language can be overcome. *TAMA v. Lewis*, 444 U.S. at 20, 100 S.Ct. at 247. Second, the legislative history is *not* examined to ascertain whether the 1890 Congress intended to abrogate an existing private federal right (since, contrary to the Sierra Club's position, one did not exist), but to ascertain whether, in spite of the language used by Congress, there is persuasive evidence that a new private federal action was being created.

The Sierra Club brief contains truncated excerpts from the Senate debates in 1890. However, a full reading of 21 Cong.Rec., pp. 8602-8608 is needed to obtain the full flavor of what Congress was considering. The participating Senators were totally concerned with what powers should be

granted to the Secretary of War. The focus of the debate centered on what degree of administrative authority should be provided and whether criminal sanctions should be included. The quotation from the remarks of Senator Vest (Sierra Br. 37), which the Sierra Club characterizes as an eloquent exposition of the need for public enforcement, was, in fact, an eloquent plea for broad governmental powers since private suits were ineffective. As Senator Vest stated:

> The only power they respect in this country is the power of the General Government. The only way you can reach them is through the federal power. [21 Cong.Rec. 8603].

Petitioners believe that the tenor of the entire debates demonstrates that the Senate specifically intended to grant exclusive authority in the Secretary of War to administer and enforce this new Act which was being enacted to create the federal authority which the *Willamette* case found lacking. But the best the Sierra Club can hope to gain from these debates is an argument that Congress didn't even consider the subject. This, however, is a far cry from the requirement that persuasive evidence of legislative intent must be found to overcome the interpretation flowing from the statutory language.

B. The Sierra Club's Other Contentions With Respect to Private Rights of Action Are Without Merit.

The bulk of the Sierra Club's argument involves statutory interpretation and legislative history. However, several other points warrant a brief reply.

1. The Sierra Club's reliance on the post-1890 cases is unpersuasive. (Sierra Br. 47-60). The totality of the cases cited simply show the magnitude of the split in authority on this issue throughout the Circuits. The cases denying a private right of action can not be distinguished by inferring

they are dicta or involve other sections of the Act permitting exclusively criminal enforcement. (Sierra Br. 53-54). For example, the section of the 1899 Act involved in *City of Evanville v. Kentucky Liquid Recycling*, 604 F.2d 1008 (7th Cir. 1979) and *Connecticut Action Now Inc. v. Roberts Plating*, 457 F.2d 81 (1972) has been held to be enforceable through injunction although the enforcement authority is pursuant to Section 17 of the 1899 Act (33 USC Sec. 413) rather than Section 12 (33 USC Sec. 406). (See discussion in the *Connecticut Action Now* opinion, 457 F.2d at 88.) Therefore, the holdings in these cases rejecting private enforcement are highly relevant.

2. The Sierra Club's effort to dismiss the importance of the enforcement language in Section 17 of the 1899 Act (33 USC Sec. 413) because it allegedly refers "exclusively to the criminal prosecutions" authorized by the Act (Sierra Br. 16, fn.) cannot withstand close scrutiny. Section 17 says "the Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of" *all relevant sections of the Act, including Section 12 (33 USC Sec. 406), the Section which specifically authorizes injunctive relief.* As the Second Circuit stated in *Connecticut Action Now*:

> This instruction is not limited in wording to criminal prosecutions but on its surface concerns all "legal proceeding necessary to enforce" the statute. This would ordinarily cover injunctions as well as criminal process. [457 F.2d at 89].

3. The Sierra Club states that private enforcement should be authorized to enable them to sue the United States. (Sierra Br. 66-68). This plea actually cuts against its position. This Court's primary task is to ascertain legislative intent. Given the well-known attitude of 19th Century Congresses and courts towards sovereign immunity, it is hard to imagine a conscious Congressional decision to authorize

private suits against the sovereign without substantial controversy and debate. There is nothing in the legislative history which raises the slightest inference that such suits were contemplated. In the absence of such historical evidence, granting a remedy based on desirability arguments, such as this, is not the function of the courts. *Touche Ross v. Redington*, 442 U.S. at 575-76, 99 S.Ct. at 2489.

4. Finally, the Sierra Club erred in challenging our characterization of this case as one traditionally relegated to state law. (Sierra Br. 69-70). Neither the complaint nor the evidence adduced at trial indicated any interference with transportation of people or goods. The entire thrust of the plaintiffs' case below involved water quality, the environment, and fish and wildlife matters. These are areas traditionally relegated to state law. The true purpose of this litigation is candidly stated in the closing sentence of the National Wildlife Federation's amicus curiae brief:

> If Section 10 were construed otherwise, as petitioners urge, the Corps might well find itself powerless to prevent a state water project which had disastrous environmental consequences from the federal point of view, but which had only marginal effects on navigation [Nat. Wild. Br. 28-29].

In other words, the Ninth Circuit opinion should be upheld to authorize federal intervention into traditionally state law issues even though no transcendent federal navigation interest is involved.

II.

FAILURE TO JUSTIFY AN UNNECESSARY MAJOR EXPANSION OF SECTION 10 PERMIT JURISDICTION.

The briefs for respondents and *amici* attempt to legitimize a disturbing and unnecessary expansion of administrative regulatory jurisdiction over local water supply allocations.

That expansion is of critical importance to petitioners independently of the private right of enforcement question, because the Corps of Engineers has now invoked that additional jurisdiction in its 1899 Act regulations (33 CFR §322.3, July 1, 1980). Furthermore, the Corps is currently processing an application for a Section 10 "operating" permit for the water diversion challenged in this proceeding.[3] Without a clear rejection of the lower courts' expansion of Section 10 permit jurisdiction over water supply diversions, the Corps may continue to assert the authority to impose that jurisdiction even if this Court rules that Section 10 does not include a private right of enforcement.

The briefs of respondents and *amici* attempt to support expansion of Section 10 permit authority to water supply operations outside of navigable waters by misstating our position on the scope of Section 10 regulatory jurisdiction. In addition, they rely on a mistaken assumption that the threshold for permit jurisdiction under the first clause of Section 10 is the same as the threshold for similar jurisdiction under the second and third clauses of that section.

A. The Briefs of Respondents and Amici Propose a Disturbing Expansion of Federal Regulatory Activities.

The respondents' assertion that the petitioners seek modification of "the scheme clearly set out in Section 10 of the 1899 Act" (Fed. Br. 14), represents a disturbing example of Orwellian "double-think". On the contrary, it is the respondents, rather than the petitioners, that are proposing a major departure from the manner in which Section 10 had been administered for at least 74 years.

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[3]The State of California filed the application under compulsion of the District Court's injunction implementing its 1975 Decision (Fed. Br. 8, n. 10).

In effect, the respondents seek ratification of the Corps of Engineers' April 3, 1974 amendment of its Section 10 regulations (33 CFR §209.120; 39 FR 12118).[4] That amendment added the following phrase to the previous description of activities subject to Section 10 permit jurisdiction:

> . . . any other work affecting the course, location, condition or capacity of such waters [33 CFR §209.120(b)(2)].

Until then, the Corps' Section 10 permit jurisdiction was limited to construction of facilities described in the second clause of Section 10 and to:

> . . . excavation or fill in navigable waters [§209.120(b)(1)(b); July 1, 1973].

Thus the respondents, after three-quarters of a century of interpreting Section 10 permit jurisdiction as limited to the express provisions of the second and third clauses of that section, are now attempting to expand that jurisdiction by eliminating the term "channel" from the third clause of Section 10; by adding automatic permit jurisdiction over all possible activities that could only fall within the first clause of Section 10; by circumventing the rule established by this Court in *United States v. Rio Grande*, 174 U.S. 690, 709, 19 S.Ct. 770, 777; and by ignoring well-established Congressional policy.

Even more disturbingly, respondents now seek to validate that expansion of federal regulatory jurisdiction, in an action that seeks redress on recreational, commercial fishing, duck hunting, water quality and water supply issues, rather than redress for interference with waterborne commerce. Indeed, the briefs clearly indicate that the purpose of the suit is

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[4]Copies of the relevant sections of the 1974 amendment and of the preexisting regulations are set forth in the appendix to this reply.

"to prevent a state water project" which has "only marginal effects on navigation" (Nat. Wild. Br. 29).

Respondents seek that expansion of permit jurisdiction on the basis of hydraulic variations that do not pose any threat to either present or prospective navigation; and which, in fact, fall within historical variations that occur independently of the challenged water supply diversion (Pet. Br. 39, 40). Furthermore, the variations on which the District Court relied grossly overstate the changes attributable to that diversion because they include the effects of substantial federal project diversions which the Circuit Court exempted from the Corps' operational permit jurisdiction (Ptn. App. 41-49, 88-91).

Finally, the respondents seek to validate new permit jurisdiction to regulate diversion operations in a situation where those operations are already extensively regulated under state water supply allocation and environmental protection laws; and where those operations control the water supply for over half the State's population (Pet. Br. 2-5). Thus, if this Court recognizes respondents permit jurisdiction over the challenged diversion, the Corps of Engineers will establish jurisdiction over State water allocations and thus over a major state water supply project, even though that diversion has, at most, only a marginal effect on navigation (Nat. Wild. Br. 29).

That jurisdiction would clearly reverse the existing presumption established by Congress and recognized by the decisions of this Court, that nonstructural water supply diversions regulated under state water allocation laws, do not impair federal interests in the absence of a showing of substantial interference. Instead, nonstructural water supply diversions from navigable streams would be presumed to obstruct navigable capacity, and would require federal operating permits at the discretion of the Corps of Engineers.

B. The Briefs of Respondents and Amici Misstate Petitioners' Position on the Regulatory Jurisdiction of Section 10 of the Rivers and Harbors Act of 1899.

The briefs of respondents and *amici* misstate our position on the Corps of Engineers permit jurisdiction. We are not seeking to reduce the historical Section 10 permit jurisdiction as those briefs state (*e.g.* Fed. Br. 10, 14, 26). We do recognize that the Corps of Engineers has automatic permit jurisdiction under the second and third clauses of Section 10. We certainly recognize that the State was required to obtain a Section 10 permit from the Corps of Engineers when it modified Delta channels by constructing the diversion gates to Clifton Court Forebay (Pet. Br. 46-47). Furthermore, we recognize that the Corps has continuing jurisdiction over the operation of those gates "so as to render navigation reasonably free, easy and unobstructed" (Jt. App. 117a).

We also recognize that the Government has regulatory jurisdiction under the first clause of Section 10, over activities not covered by the second or third clauses. Nevertheless, that jurisdiction exists only under certain conditions, and does not include automatic permit jurisdiction.

Our basic position is, of course, that the challenged water diversion does not now fall within any of the clauses of Section 10.

1. The Diversion Is Not a Third Clause Activity.

We have consistently argued that the challenged diversion is not the type of activity that Congress intended to regulate by operational permit controls under Section 10, in the absence of a tangible demonstration of unreasonable impairment of navigable capacity. More specifically, the diversion activity which respondents seek to regulate is *not* plainly forbidden by the third clause of Section 10 as the respon-

dents argue (*e.g.* Fed. Br. 34). It involves neither the construction of a structure within navigable waters, nor modification of a structure that confines navigable waters.

We do not agree that the word "channel" can be eliminated from that clause in the absence of Congressional action as the respondents propose. As this Court has recently reiterated, statutory construction must begin with the language of the statute (*Diamond v. Chakrabarty*, ... U.S. ...., 100 S.Ct. 2204, 2207 (1980); *Perrin v. United States*, ... U.S. ...., 100 S.Ct. 311, 314 (1979)). In their ordinary meaning, the activities listed in the third clause of Section 10 are commonly limited to those activities that modify the natural or manmade structures that confine navigable waters.

The respondents reply that the inclusion of the word "course" expands that clause to include water diversions that do not affect the physical structure confining the water body. They argue that the word "course" relates to "waters" rather than to streambeds (Fed. Br. 29). However, that argument ignores the plain meaning of the word "course" when used in the context of a river or other body of water. For example, Black's Law Dictionary clearly distinguishes between "course" and "current" in defining the phrase "course of a river":

> The course of the river is a line parallel with its banks; the term is not synonymous with the 'current' of the river. *Attorney General v. Railroad Co.*, 9 N.J.Eq. 550. [Black's Law Dictionary, Rev. Fourth Ed., 1976, p. 424.]

In addition, the respondents attempt to restrict this Court's ruling in *Oklahoma v. Texas*, 258 U.S. 574 (1922). That ruling did not limit the term "channel" to the thread of the navigable current as respondents propose (Fed. Br. 30). Instead, it defined the channel in question as the area "ex-

tending from one cut bank to the other, which carries the water in times of a substantial flow'', 258 U.S. at 594, thus reaffirming that the term ''channel'' connotes a structure, rather than a current.

The respondents also attempt to justify the *de facto* removal of the term ''channel'' from the third clause by suggesting that Section 10 would not otherwise ''cover reductions in the capacity of a stream to carry boats caused by water diversions'', (Fed. Br. 30). But that suggestion ignores the protection provided by the first clause of Section 10 against obstructions that substantially interfere with navigable capacity within the limits where navigation is a recognized fact, *United States v. Rio Grande, supra.*

2. The Diversion Is Not a First Clause Activity.

Contrary to respondents' assertions, we have also consistently argued that the factual situation now before the Court does not constitute an obstruction to navigable capacity within the meaning of the first clause of Section 10 (Fed. Br. 32; Pet. Br. 43-46). More particularly, we described in the brief we submitted to the Circuit Court the reasons why the Record does not support the District Court's conclusion that the challenged diversion obstructs navigable capacity. (Intervenors-Appellants' Brief to Court of Appeals, June 21, 1976, pp. 37-46.)

Should this Court reject the Circuit Court's broad reading of the third clause of Section 10, the respondents would have this Court recognize presumptive permit jurisdiction over the challenged water diversions, on the basis of the first clause of that section (Fed. Br. 32; Sierra Br. 78, 79). However, regulatory jurisdiction under that clause, as described below, differs importantly from that under the third clause. Indeed, this Court has established a specific rule of

substantial interference for the first clause in *United States v. Rio Grande, supra.*

The District Court misapplied that rule by drawing a defective and superficial analogy with *Sanitary District of Chicago v. United States,* 266 U.S. 423, 45 S.Ct. 177 (1924) (Ptn. App. 86, 87). That decision involved extensive and well documented impairment of commercial navigation; hydraulic variations that clearly exceeded historical variations; pre-existing *structural* permits; and an activity that did not involve the Congressional presumption of deference to state water supply allocations (Fed. Br. 39; Pet. Br. 43).

C. The Respondents Mistakenly Assume the Same Regulatory Threshold for All of the Section 10 Clauses.

The respondents and *amici* fail to recognize that the threshold for regulatory jurisdiction over activities covered by the first clause of Section 10 is not the same as the threshold for permit jurisdiction over activities covered by the second and third clauses. Consequently, they assume that all activities that could conceivably be classified as obstructions to navigable capacity automatically fall within the Corps of Engineers' permit jurisdiction (Fed. Br. 30).

That assumption is defective because the first clause of Section 10 does not impose automatic administrative jurisdiction as do the second and third clauses. Indeed, this Court in *United States v. Rio Grande, supra,* has established a specific test for invoking regulatory control over activities covered only by the first clause of Section 10. That test incorporates a presumption that water diversions that, as here, represent allocation of water under state water rights law, do not represent an obstruction of navigable capacity. Rebuttal of that presumption requires a factual showing that the diversion "substantially interferes with the navigable

capacity within the limits where navigation is a recognized fact", (174 U.S. at 709-710, 19 S.Ct. at 777). There clearly is no suggestion in this case, as there was in *Rio Grande*, that the challenged diversion would "destroy" the navigable capacity of the Delta (Pet. Br. 39-40).

The *Rio Grande* test and presumption have been ratified by subsequent Congressional declarations of deference to the appropriation of water supplies under state water rights law (Pet. Br. 28-33). Furthermore, those declarations have been recognized and incorporated in recent decisions of this Court, *California v. United States*, 438 U.S. 645, 678, 98 S.Ct. 2985, 3002 (1978); *United States v. New Mexico*, 438 U.S. 696, 701-702, 98 S.Ct. 3012, 3015 (1978). Certainly, those declarations do not suggest any reversal of the *Rio Grande* presumption.

The Congressional declarations of a presumption in favor of state regulation of water diversions are much more pervasive than respondents suggest. The allegation that we rely primarily on Section 8 of the Reclamation Act of 1902 is just not true (Fed. Br. 36). Our reliance is also based on at least 20 subsequent statutes that are not part of the Reclamation Act (Ptn. App. 134-151). One of those statutes is the McCarren Amendment which this Court recently described as an "eloquent expression of the need to observe state water law" (Ptn. App. 140-141; *United States v. New Mexico, supra*, 438 U.S. at 678, 98 S.Ct. at 3002).

Furthermore, since this present case specifically raises water quality issues (Fed. Br. 6; Jt. App. 22a), the declaration in the 1977 Clean Water Act provides a specific and current restatement of Congressional policy of *not* imposing federal controls on water allocations established by state law, in the absence of a tangible, rather than marginal, inconsistency with a substantial federal interest (Ptn. App. 150, 151).

Conclusion.

For the reasons stated above, the petitioners urge this Court to reverse the judgment and opinion of the Circuit Court, including its recognition of automatic Section 10 permit controls over non-structural water supply diversions.

Respectfully submitted,

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APPENDIX.

PERTINENT PROVISIONS OF 1899 RIVERS AND HARBORS ACT REGULATION, 33 CFR §209.120(a) and (b).*

As of July 1, 1973:

§209.120 Permits for work in navigable waters.

(a) *Organization*—(1) *Civil functions of the Department of the Army*. In addition to its military duties, the Department of the Army, acting through the Corps of Engineers performs extensive civil functions which include the execution, operation, maintenance, and control of river and harbor and flood-control improvements authorized by law, and the administration of certain laws enacted by Congress for the protection and preservation of navigation and navigable waters of the United States.

(2) *The Corps of Engineers*—(i) *Central organization*. The civil functions of the Department of the Army are carried out by the Corps of Engineers. The Chief of Engineers commands the Corps of Engineers and is responsible to the Secretary of the Army. On his staff in the Office of the Chief of Engineers, Washington, D.C. 20315 the Director of Civil Works is directly responsible for the civil functions described herein.

(ii) *Field organization*. For administrative convenience and to permit decentralization of Civil Works operations, the United States and its possessions are divided into 11 ''Divisions'' which are subdivided into 37 ''Districts''. The Division Engineer in charge of a Division supervises the activities of the District Engineers in charge of the District offices in that Division.

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*The material contained in subsection (b) is now contained in 33 CFR §§ 320.2 and 322.33 (July 1, 1980).

All Division and District Engineers are commissioned Army officers. In the United States the boundaries of Districts and Divisions are governed by the limits of the watersheds of principal rivers.

(b) *Jurisdiction*—(1) *Principal laws*. (i) The principal laws for the protection and preservation of navigation and navigable waters of the United States, administered by the Corps of Engineers, are:

(*a*) *Dams and dikes across waterways*. Location and plans of dams and dikes across navigable waters must be approved by the Chief of Engineers and Secretary of the Army prior to construction. Section 9 of the River and Harbor Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401).

(*b*) *Piers, dredging etc., in waterways*. Plans for wharves, piers, dolphins, booms, weirs, breakwaters, bulkheads, jetties, or other structures, *and excavation or fill in navigable waters* must be recommended by the Chief of Engineers and approved by the Secretary of the Army. Section 10 of the River and Harbor Act of March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403). The authority of the Secretary of the Army to prevent obstructions to navigation was extended to artificial islands and structures on the Outer Continental Shelf (Section 4(f)) of the Outer Continental Shelf Lands Act approved Aug. 7, 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). (Emphasis added)

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As amended on Apr. 3, 1974 per 39 FR 12118:

§209.120 Permits for activities in Navigable Waters or Ocean Waters.

(a) *Purpose*. This regulation prescribes the policy, practice, and procedure to be followed by all Corps of Engineers installations and activities in connection with applications for permits authorizing structures and work in or affecting navigable waters of the United

States, the discharge of dredged or fill material into navigable waters, and the transportation of dredged material for the purpose of dumping it into ocean waters.

(b) *Laws requiring authorization of structures or work.* (1) Section 9 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 401) prohibits the construction of any dam or dike across any navigable water of the United States in the absence of Congressional consent and approval of the plans by the Chief of Engineers and the Secretary of the Army. Where the navigable portions of the waterbody lie wholly within the limits of a single State, the structure may be built under authority of the legislature of that State, if the location and plans or any modification thereof, are approved by the Chief of Engineers and by the Secretary of the Army. The instrument of authorization is designated a permit. Section 9 also pertains to bridges and causeways but the authority of the Secretary of the Army and Chief of Engineers with respect to bridges and causeways was transferred to the Secretary of Transportation under the Department of Transportation Act on October 16, 1966 (80 Stat. 941, 49 U.S.C. 1165g(6)(A)).

(2) Section 10 of the River and Harbor Act approved March 3, 1899 (30 Stat. 1151; 33 U.S.C. 403) prohibits the unauthorized obstruction or alteration of any navigable water of the United States. The construction of any structure in or over any navigable water of the United States, the excavation from or depositing of material in such waters, or *the accomplishment of any other work affecting the course, location, condition, or capacity of such waters* are unlawful unless the work has been recommended by tbe Chief of Engineers and authorized by the Secretary of the Army. The instrument of authorization is designated a permit or letter

of permission. The authority of the Secretary of the Army to prevent obstructions to navigation in the navigable waters of the United States was extended to artificial islands and fixed structures located on the outer continental shelf by section 4(f) of the Outer Continental Shelf Lands Act of 1953 (67 Stat. 463; 43 U.S.C. 1333(f)). (Emphasis added)

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